COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

The Berkshire Gas Company	)	D.T.E. 06-27

MOTION OF THE BERKSHIRE GAS COMPANY FOR THE DEPARTMENT TO (i) MAINTAIN THE APPROPRIATE SCOPE OF PROCEEDING, (ii) GRANT SUMMARY JUDGMENT, OR (iii) FOR SUCH OTHER RELIEF AS MAY BE NECESSARY AND APPROPRIATE

Now comes The Berkshire Gas Company ("Berkshire" or the "Company") and respectfully requests that the Department of Telecommunications and Energy:

(i) enter such orders and directives as are necessary so as to maintain the appropriate scope of this proceeding to the issues described in relevant Department precedent for a petition pursuant to Section 94A;

(ii) enter an order for summary judgment that the gas purchase rights pursuant to the Fuel Purchase Agreement, as defined below, are no longer available in terms of providing reliable service to the Company's customers; and

(iii) take such other actions as may be necessary and appropriate consistent with the above orders.

In support of these motions, the Company states the following:

I. INTRODUCTION

On February 28, 2006, Berkshire filed a Petition for Approval of Gas Sales Agreement Between The Berkshire Gas Company and Coral Energy Resources, L.P. ("Coral") with the Department of Telecommunications and Energy (the "Department"). Berkshire's Petition sought approval of three integrated agreements: (i) a North American Energy Standards Board (NAESB) Base Contract dated as of November 1, 2005 ("Base Contract"); (ii) a Transaction

Confirmation dated as of December 7, 2005 (Confirmation"); and (iii) a Letter Agreement dated as of January 27, 2006 ("Letter Agreement"). The Base Contract, Confirmation and Letter Agreement are referred to collectively as the "Sales Agreement." The Sales Agreement is for a term of seven (7) years and provides that Berkshire shall be entitled to a firm delivered gas supply at its Pittsfield citygate in the amount of 7,500 MMBtus per day for the peak period (i.e., December 1 through February 28) for the 2005/2006 winter through the 2007/2008 winter. For the remainder of the term (winter 2008/2009 through winter 2011/2012), the volume entitlement shall be 5,000 MMBtus per day. In addition, the Company submitted the prepared testimony and schedules of Jennifer M. Boucher, Manager – Regulatory Economics, in support of the Petition.

Consistent with the established procedural schedule, the Attorney General issued two sets of information requests in this proceeding and the Company filed its responses on April 25, 2006 and May 12, 2006. Many of the information requests issued by the Attorney General relate to the terms of a certain Fuel Purchase Agreement ("FPA") dated March 15, 1989 between Berkshire and Altresco, Inc. ("Altresco") the developer of an electric generation facility in Pittsfield, Massachusetts (the "Plant") that was under development at the time of the execution of the FPA.[1] In addition, on May 12, 2006 the Attorney General issued a subpoena pursuant to the process described in 980 CMR 1.02(10)(j) to a principal of PurEnergy, L.L.C., the current operator of the Plant, wherein the Attorney General sought the production of documents relating to the Plant's gas supply and transportation agreements. At the evidentiary hearing on May 23, 2006, the Attorney General marked a number of documents some of which were obtained pursuant to its subpoena for identification and indicated his intention to cross-examine the Company's witnesses with respect to the status of the FPA and the nature of any rights or remedies that the Company may have with respect to the unavailability of the FPA

[1] The FPA was amended pursuant to an Amendment to Fuel Purchase Agreement dated December 11, 1992 and was subsequently approved by the Department in docket D.P.U. 93-22.

resource. Tr. 47. The Attorney General's Initial Brief also indicated his intent to review whether the Company acted properly to mitigate damages to customers. AG In. Br., p. 3.

Specifically, the Attorney General's brief indicates his intention to elicit evidence in this proceeding on the issues of whether the Company properly mitigated costs presumably with respect to the termination of the FPA. This motion demonstrates that the admission of evidence with respect to the Company's consideration of potential mitigation remedies with respect to the FPA is contrary to established Department precedent and also premature, irresponsible and could seriously prejudice the interests of the Company's customers and, therefore, should be disallowed or deferred by an order maintaining and confirming the appropriate scope of this proceeding. In addition, this motion demonstrates that the "unavailability" of the FPA is settled as a matter of law and that entry of summary judgment is proper with respect to the unavailability of the FPA.

II. STATEMENT OF FACTS

The FPA had provided Berkshire with certain "Peak Season Rights," namely the right to purchase a portion of the Plant's gas supply during specified winter months. Berkshire was charged for gas that it purchased plus the cost of the Plant's alternative fuel. Exh. AG 1-19, FPA §§1, 5. The Peak Season Rights contributed to a least cost resource plan for Berkshire during peak demand periods for many years. As the Company's testimony explained, the Agreement with Coral was secured as part of an overall strategy to replace the FPA. Exh. BG 1, pp. 9-10. The Department recently approved a separate contract between Berkshire and Tennessee Gas Pipeline Company ("Tennessee") as part of Tennessee's "ConneXion Project" in The Berkshire Gas Company, D.T.E. 05-58, p. 7 (2006) finding that such resource was necessary in order to partially "replace the capacity no longer available" through the FPA (emphasis added).[2]

[2] Interestingly, the Attorney General intervened and participated in D.T.E. 05-58 but did not submit a brief on the unavailability of the FPA or any other issues.

Altresco and its ultimate successor in interest, Pittsfield Generating Company, L.P., secured a range of gas supply and transportation resources to meet the requirements of the Plant. In July 2002, Tennessee and Pittsfield Generating executed new Gas Transportation Agreements pursuant to Tennessee's FT-A Rate Schedule. Exh. AG 2-8 (Attachment (a)). These agreements amended the prior transportation arrangement for service from Niagara, New York to the Bousquet Meter Station in Pittsfield, Massachusetts. These agreements were accepted by the FERC in a letter order dated August 2, 2002 in docket RP96-312-077. Id.

The Tennessee FT-A agreement provided that "shipper" (i.e., Pittsfield Generating) "shall not assign this Agreement or any of its rights [thereunder], except in accordance with Article III, Section 11 of the General Terms and Conditions of [Tennessee's] FERC Gas Tariff." Id. at Attachment (a), Section 14.1. Article VIII of the Tennessee FT-A agreement also provided that the agreement was "subject to the effective provisions of [Tennessee's] Rate Schedule FT-A and to the General Terms and Conditions incorporated therein, as the same may be changed or superseded from time to time in accordance with the rules and regulations of the FERC." Id. at Article VIII. This FT-A agreement remained in effect until late 2004.

In 2004, Berkshire was advised by PurEnergy, the entity then operating the Plant, that Pittsfield Generating was altering operations at the Plant and was terminating some of its gas-related contracts. Exh. BG-1, p. 7; Exh. DTE 1-6. Berkshire, among other actions, investigated these changes including the pursuit of discussions with Tennessee representatives and also the review of a range of materials relating to Federal Energy Regulatory Commission ("FERC") dockets, including materials in FERC docket RP96-312-144.[3] This docket includes a filing letter to the FERC from Tennessee dated November 15, 2004 and that references FT-A service agreements between Tennessee and Coral, the second of which related to the firm capacity from Niagara to Bousquet that had supported the FPA (Exh. AG 1-22 (Attachment (a)) wherein

[3] Berkshire recognized the need to secure an incremental resource for the impending heating season and secured a supplemental short-term contract from Distrigas of Massachusetts Corporation. This resource enable the Company to provide reliable service for the 2004/2005 winter. The Company advised the Department of this development. Exh. DTE 1-6 (Attachment C).

Tennessee stated that "on November 12, 2004, [Pittsfield Generating] permanently released the [Pittsfield Generating] negotiated rate agreement to Coral pursuant to the capacity release provisions of Tennessee's FERC Gas Tariff." Id. In a letter order issued December 14, 2004, the FERC accepted the Coral agreements noting that Pittsfield Generating had "permanently released the negotiated rate agreements to Coral pursuant to the capacity release provisions of Tennessee's FERC Gas Tariff." Id. at Attachment (b), note 1.

Section 11 of Tennessee's FERC Gas Tariff provides that in the event of a "permanent release," or a release by the shipper of the entire remaining term of the shipper's service agreement, the assignee (here Coral) "shall receive all contractual rights and obligations associated with the released capacity . . . (emphasis added)." This confirms that the permanent release referenced in the FERC decision left Pittsfield Generating with no contractual rights to Tennessee transportation service between Niagara and Bousquet. This can be further confirmed by a review of Tennessee's Customer Index that is maintained pursuant to 18 CFR §284.13(c)(1). This index is limited to all of a transporter's "firm transportation . . . customers under contract." Exh. AG 2-8 (emphasis added). Tennessee's Customer Index, available at its web site, references Coral but not Altresco or Pittsfield Generating. Id. Thus, the only proper conclusion that can be drawn from this information is that the FPA resource was not available. Again, the Department recently made this same finding in D.T.E. 05-58.

In addition, the actual terms of the FPA confirm that this resource is not "available." The FPA provided peak season purchase rights subject to a number of conditions, including, for example, the availability of an alternative fuel. Section 6 of the FPA provided as follows:

> Term: This Agreement shall be effective upon execution and shall be coterminous with the terms of the Gas Purchase Agreement, the Support Agreement, the Transportation Agreements and the Berkshire Transportation Agreement but shall terminate in the event that . . . either the Gas Purchase Agreement, the Support Agreement, any of the Transportation Agreements or the Berkshire Transportation Agreement is terminated pursuant to the terms of each Agreement.

Exh. AG 1-19 FPA, §6, pp. 9-10. The "Gas Purchase Agreement" was defined in the FPA to be the Plant operator's Canadian gas supply contract and the "Transportation Agreements" were defined to include the Plant operator's contracts for transportation through the facilities of Nova Corporation of Alberta, TransCanada Pipelines Limited and Tennessee. Id. at 1-2. Thus, the FPA expressly provided that it was "coterminous with the terms" of these agreements that were, in fact, essential to the ability of the Plant operator to provide reliable peak season sales service. Further, the FPA certainly was terminated if any one of these underlying agreements relating to the Plant's gas supply or transportation rights was "terminated" pursuant to its own terms or conditions. Therefore, Berkshire's purchase rights were expressly subject to, among other things, several layers of firm natural gas transportation service being available to the Plant operator. Id. at 5. As indicated, at the least, the Tennessee transportation rights of the Plant operator had been terminated by the permanent release of Pittsfield Generating's Tennessee capacity described above and, thus, the FPA was effectively terminated.

III. RELEVANT STANDARDS OF REVIEW

A. Standard Pursuant to Section 94A.

In evaluating a gas company's acquisition of resources, the Department has indicated that it will examine whether the resource is consistent with the public interest. Bay State Gas Company, D.T.E. 98-79, p. 1 (1998); Commonwealth Gas Company, D.P.U. 94-174-A, p. 27. The Department has held that in order to demonstrate that a resource is consistent with the public interest, a gas company must show that, at the time of the acquisition or contract negotiation (emphasis added), the acquisition: (i) compares favorably to the range of alternative options reasonably available to the company and its customers, including releasing capacity to customers migrating to transportation; and (ii) is consistent with that company's portfolio objectives. Id. The company may demonstrate that it has satisfied its portfolio objectives by reference to the portfolio objectives established in a recently approved forecast and supply plan, in a recent review of a supply contract under G.L. c. 164, §94A, or in a description of the

Company's objectives that accompanies its filing with the Department. Id. See also, Berkshire Gas, D.T.E. 05-58. The Department also explicitly held that the proper scope of a Section 94A proceeding does not include a review of prudence, resource reliability levels or cost recovery. Commonwealth Gas, D.P.U. 94-174-A, pp. 29-30.

B. Standard for Summary Judgment.

The Standard Adjudicatory Rules of Practice and Procedure, which govern the conduct of formal proceedings of agencies subject to Chapter 30A such as the Department, authorize the use of full or partial summary decision in agency decisions. 801 C.M.R. §1.01(7)h). See also 220 CMR 1.06(6)(e). The Rules specifically provide that "[w]hen a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense." Id. Summary decision may be granted by an administrative agency where the pleadings and filing conclusively show that the absence of a hearing could not affect the decision. Mass Outdoor Advertising Council v. Outdoor Advertising Bd., 9 Mass. App. Ct. 775, 785-786. 405 N.E. 2d 151 (1980); Media One of Massachusetts Inc., D.T.E. Cable Television Division, Docket No. CTV 02-12 (2002). Moreover, an evidentiary hearing is never required if the dispute only involves issues of law or policy. Kenneth Culp Davis, Administrative Law Treatise, Volume 1, §8.4 at 389, citing Heckler v. Campbell, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983); United States v. Storer Broadcasting Co., 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956). By way of example, the Department's Cable Division has stated that summary judgment is "appropriate where it has been demonstrated that no genuine issue [of] material fact exists and where the moving party is entitled to judgment as a matter of law." Belmont Cable Associates v. Belmont, CATV 1-65, at 3 (1988), citing Greater South Shore Cablevision, Inc., v. Board of Selectmen of Scituate and Scituate Cablesystem Corporation, CATV A-32 (1983).

The party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue, even if it would have no burden on an issue if the case were to go to trial. Attorney General v. Bailey, 386 Mass. 367, 371, 4326 N.E.2d 139, cert. denied sub nom Bailey v. Bellotti, 459 U.S. 970, 103 S.Ct. 301, 74 L.Ed.2d 282 (1982). If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment. O'Brion, Russell & Co., v. LeMay, 370 Mass. 243, 245, 346 N.E.2d 861 (1976).

IV. ARGUMENT

A. Motion to Maintain the Appropriate Scope of Proceeding.

The only issue properly before the Department in this proceeding is whether the Sales Agreement is in the public interest. This determination is based upon the questions of (i) whether the Sales Agreement is consistent with Berkshire's portfolio objectives and (ii) whether this resource compares favorably to the range of alternative options reasonably available to the Company and its customers. Commonwealth Gas Company, D.P.U. 94-174-A, p. 27 (1996). The only issue with respect to the FPA that is relevant to these questions is whether, "at the time of acquisition or contract negotiation," the FPA has been terminated or was unavailable and, therefore, that there is a need for an additional resource. The evidence is irrefutable that the FPA resource has become unavailable and, when recently faced with the exact same question in D.T.E. 05-58, the Department properly found that the FPA rights were, in fact, no longer available. As described below, there can be no question that the FPA is unavailable. Thus, the Department need not consider the extraneous issues proposed to be raised by the Attorney General in reviewing Berkshire's petition for approval of the Sales Agreement.

The Attorney General's intention to review the Company's actions with respect to the termination of the FPA are contrary to precedent, irrelevant, premature and potentially harmful to the interests of customers. As noted above, the Commonwealth Gas standard requires only the examination of the need for the additional resource at the time of procurement. Moreover, the Department has expressly warned of the potential harm to customers that could result from the type of investigation proposed by the Attorney General in this proceeding. The Department has held that:

> For purposes of cost recovery, the prudence of LDC management of these contracts will be determined in rate cases or CGAC proceedings as appropriate. To impose the burden of administrative proceedings on LDC's during the contracting process would subject those companies and their ratepayers to unique market constraints, thus placing them and the Commonwealth's economy as a whole at a potentially significant competitive disadvantage when cost-effective gas supplies are sought.

Commonwealth Gas, D.P.U. 94-174-A, p. 30. Accordingly, the expansion of the scope of this proceeding may result in direct harm to customers or may establish a precedent with the same ultimate effect, namely the inability of Berkshire to respond on a timely basis to market conditions. See also, Tr. 36.

In addition, there is direct, recent and, perhaps not surprisingly, related Department precedent on the proper scope of a proceeding on a contract. In a case involving the review of termination agreements for certain purchase power agreements ("PPA's") involving the Plant now operated by Pittsfield Generating (Cambridge Electric Light Company/Commonwealth Electric Company, D.T.E. 04-60 (2004)), the Attorney General sought to pursue a similar approach as in this proceeding. The electric utilities in question had sought approval of a restructuring of the PPA's pursuant to G.L. c. 164, §1G.[4] The Attorney General argued that the Department should review the question of whether those electric utilities had fully mitigated cost impacts for customers and whether they should have pursued litigation with

[4] The standard of review for a Section 1G filing, similar to a Section 94A review, is whether the relevant agreement "is in the public interest." Cambridge Electric/Commonwealth Electric, D.T.E. 04-60, p. 6; See also Western Massachusetts Electric Company, D.T.E. 99-101, pp. 5-6 (2000); Commonwealth Electric Company, D.P.U. 91-200, p. 5 (1993); cf. Commonwealth Gas, D.P.U. 94-174-A, p. 27. Thus, the Department should dismiss any argument that this precedent is not controlling merely because it involves a different section of Chapter 164.

respect to the PPA's being restructured. The Attorney General was seeking to advance this argument by cross-examination of the utilities' executive on the interpretation of contract matters. Objections were raised as to the scope of the proceeding and the proper range of testimony. In affirming a ruling of the Hearing Officer, the Department found that the determination as to whether the generator had "breached the PPAs is outside the scope of this proceeding." Id. at 5. Thus, there was no prejudice in the proper exclusion of certain testimony on the meaning or interpretation of the PPA's in that proceeding. The issues the Attorney General is seeking to review in this case are even more removed from the issue rejected as outside the scope in D.T.E. 04-60. The FPA is not being restructured. It is being replaced because it is unavailable and an entirely new agreement is under review. Accordingly, the Department should rely upon this recent precedent and maintain the proper scope of this proceeding.

Further, the Attorney General cannot demonstrate that the review of such issues is timely or that such questions may only be pursued in this proceeding and at this time. The Attorney General cannot demonstrate that relevant statutes of limitation have lapsed with respect to the FPA and any potential remedial actions that might be pursued by the Company. Thus, the premature review of the Company's actions would be administratively inefficient.[5]

Most importantly, the Attorney General's efforts to secure testimony and evidence on this question at this time is irresponsible and potentially harmful to customers. The Company may well be placed in the position of prejudicing its ability to secure a restructured contract or pursue other remedial actions to the extent that its witness describes the Company's understanding of the FPA and certain related agreements. The Attorney General can offer no

[5] As noted by the Department in Commonwealth Gas, there are alternative proceedings to pursue the Attorney General's argument including a base rate proceeding, a CGAC proceeding or in the review of a Forecast and Supply Plan.

basis for advancing the consideration of these questions that outweighs the significant potential harm to customers.[6]

Finally, the Company appreciates the Hearing Officer's recognition that this motion was one that the Department should not simply "take under advisement." Allowing the Attorney General's cross-examination will result in potential harm to customers that may not be undone. At the same time, the Department should not delay the consideration of the merits of the Sales Agreement in this proceeding pursuant to the established evidentiary record as such delay could place the Sales Agreement at risk of termination by the seller, a concern recognized in Commonwealth Gas. In sum, because there are substantial benefits to the more appropriate, traditional and focused review required by established Department precedent and because the Attorney General cannot offer any meaningful countervailing arguments, the Department should enter such orders to maintain the appropriate scope of this proceeding.

B. Motion for Summary Judgment.

The fact that FPA rights could no longer be part of Berkshire's resource plan for reliable service and, therefore, the fact that it was necessary to seek a replacement resource has been previously adjudicated and determined by the Department. Berkshire Gas, D.T.E. 05-58, p. 7. Further, the review of the incontrovertible evidence and related FERC decisions demonstrates that there can be "no genuine issue of fact" relating to the continuing "unavailability" of service pursuant to the FPA and, therefore, the Department should rely upon its own prior decision and proper FERC precedent and grant summary judgment with respect to the unavailability of the FPA resource and make such other procedural findings as are necessary and appropriate so that the review of the Sales Agreement may proceed efficiently.

[6] If the Attorney General persists in advancing the need to pursue these questions prematurely, he should be barred from challenging the Company's prudence as his own actions could frustrate the Company's efforts to pursue remedial action.

The fundamental bases for this conclusion are, first, the fact that the FERC has ruled on the permanent release of the Tennessee pipeline capacity underlying the FPA and, second, the clear meaning of the single sentence that defines the "Term" of the FPA. Tennessee's filing of the Coral contract and FERC's findings thereon indicate that Pittsfield Generating had property completed a "permanent release" of its Tennessee capacity from Niagara to the Bousquet meter station in Pittsfield. Pittsfield Generating had maintained an agreement for Tennessee's FT-A service. The Agreement expressly incorporated Tennessee's Terms and Conditions and expressly permitted a capacity release pursuant to Section 11 of Tennessee's FERC Gas Tariff. Exh. AG 1-22 (Attachment (a), Gas Transportation Agreement §14.1. The Terms and Conditions, as required by FERC regulation, provide for the release of capacity, including the permanent release of all of Pittsfield Generating's rights. Tennessee has indicated and FERC accepted Tennessee's representations that all the proper steps to release such capacity were undertaken. Id. at Attachment (b). All of Pittsfield Generating's contractual rights on the Tennessee system were therefore terminated; Coral now maintains this capacity. The Tennessee Customer Index does not list Pittsfield Generating or Altresco as customers "under contract" while Coral is now listed as a "customer." This also must end the analysis in terms of the need for a long term replacement resource for the FPA. Simply put, the Department can make no finding that the Pittsfield Generating FT-A agreement has not been assigned pursuant to its terms or is still somehow available and, indeed, should affirm its prior finding in D.T.E. 05-58 that the FPA resource was no longer available. There can be no other interpretation and, therefore, there can be no "genuine issue of fact" relating to this matter. Further, the interpretation of the FERC decision is a question of law and a hearing is never required on such issues.

In addition, the permanent release of Pittsfield Generating's Tennessee capacity resulted in the FPA being "terminated pursuant to [its] terms" and, thus, the conclusion that the FPA resource was no longer available. Specifically, by its terms, the FPA is effective only so long as each individual link in the Altresco or Pittsfield Generating's supply chain (i.e., the ability of Altresco to secure and deliver gas to Pittsfield) remains in place. Thus, the "term" of the FPA is coterminous with the terms of Pittsfield Generating's Canadian supply contract, its Canadian transportation agreements, its Tennessee transportation agreement and its agreement with Berkshire for transportation service on a feedline in Pittsfield. Beyond this, the FPA provides that such agreement shall terminate if any of these agreements "is terminated pursuant to the terms of each Agreement." Exh. AG 1-19, FPA §3. Section 3 of the FPA also indicates that Berkshire's FPA purchase rights are subject to the condition that the Plant operator maintain all necessary transportation rights. Simply put, there can be no argument that the FPA is terminated if any one of the underlying obligations were terminated pursuant to its own terms. The FERC acceptance of the Coral transportation agreement in 2004 is irrefutable evidence of termination of one such underlying obligation.

Accordingly, the Department should enter summary judgment on unavailability of the FPA, the same issue decided recently in Berkshire Gas, D.T.E. 05-58. See Boston Gas Company v. Department of Public Utilities, 367 Mass 92 (1975) (A party has a right to expect and obtain reasoned consistency in an agency's decisions.).[7]

V. CONCLUSION

Accordingly for the reasons stated herein, Berkshire respectfully requests that the Department grant its motion with respect to the maintenance of the proper scope of this proceeding, grant its motion for summary judgment with respect to the "unavailability" of the FPA resource by reason of the permanent release of Pittsfield Generating's FT-A transportation

[7] If summary judgment is entered, the Department may, in turn, rely upon this ruling as an independent basis for further maintaining the scope of this proceeding and precluding the Attorney General's irrelevant and burdensome proposed evidentiary presentation in this proceeding.

capacity and take such other action as is necessary and appropriate to ensure that the prompt review of the Sales Agreement is completed without prejudice to the interests of customers.

Respectfully submitted,

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